

In the Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
SEP 7 1977
MICHAEL RODAK, JR., CLERK

C. B. CHRISTENSEN, DIRECTOR OF FOOD AND
AGRICULTURE OF CALIFORNIA, ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

CALIFORNIA MILK PRODUCERS ADVISORY BOARD,
ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION
AND ITS MEMBERS IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MICHAEL N. SOHN,
General Counsel,

GERALD P. NORTON,
Deputy General Counsel,

JEROLD D. CUMMINS,
Acting Assistant General Counsel,

MARK W. HAASE,
Attorney,
Federal Trade Commission,
Washington, D.C. 20580.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	11
Exhibit A	1a

CITATIONS

Cases:

<i>Bates v. Arizona State Bar</i> , No. 76-316, decided June 27, 1977	8, 9
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473	6, 7
<i>Cantor v. Detroit Edison Co.</i> , 428 U.S. 579	9
<i>City of Lafayette v. Louisiana Power & Light Co.</i> , No. 76-864, petition for a writ of certiorari granted March 28, 1977	10
<i>Coca-Cola Co. v. Federal Trade Commission</i> , 475 F. 2d 299, certiorari denied, 414 U.S. 877	9
<i>Federal Power Commission v. Louisiana Power & Light Co.</i> , 406 U.S. 621	6, 8
<i>Federal Trade Commission v. Colgate-Palmolive Co.</i> , 380 U.S. 374	7
<i>Federal Trade Commission v. Feldman</i> , 532 F. 2d 1092	6, 7

Cases—continued:

	Page
<i>Federal Trade Commission v. Markin</i> , 532 F. 2d 541	6
<i>Federal Trade Commission v. Mary Carter Paint Co.</i> , 382 U.S. 46	7
<i>Federal Trade Commission v. Miller</i> , 549 F. 2d 452	7
<i>Federal Trade Commission v. Sperry & Hutchinson Co.</i> , 405 U.S. 233	7, 10
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773	9, 10
<i>Leedom v. Kyne</i> , 358 U.S. 184	7
<i>Macaulay v. Waterman S.S. Corp.</i> , 327 U.S. 540	6
<i>McCulloch v. Sociedad Nacional</i> , 372 U.S. 10	7
<i>McGee v. United States</i> , 402 U.S. 479	6
<i>McKart v. United States</i> , 395 U.S. 185	6, 10
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U.S. 41	6
<i>Parker v. Brown</i> , 317 U.S. 341	5, 6, 7, 8, 10
<i>United States v. Feaster</i> , 410 F. 2d 1354, certiorari denied, 396 U.S. 962	6
<i>Weinberger v. Salfi</i> , 422 U.S. 749	6
<i>Williams v. Fanning</i> , 332 U.S. 490	9

Constitution and statutes:

Cal. Const., Art. 24, §4	3
Federal Trade Commission Act , 38 Stat. 717, as amended, 15 U.S.C. (and Supp. V) 41 <i>et seq.</i> :	
Section 4, 15 U.S.C. 44	3
Section 5, 15 U.S.C. (and Supp. V) 45	2
Section 6(a), 15 U.S.C. (Supp. V) 46(a)	7
Section 12, 15 U.S.C. (Supp. V) 52	2
California Marketing Act , Cal. Agri. Code §58601 <i>et seq.</i> (West's 1967):	
§58741	3
§58841	3
§58842	3
§58845	3
§58938 (1977 Cum. Supp.)	4
§58939	4
§58940 (1977 Cum. Supp.)	4
§58941 (1977 Cum. Supp.)	4
§§58991-58993	3, 4
§59034	4

In the Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-1678

C. B. CHRISTENSEN, DIRECTOR OF FOOD AND
AGRICULTURE OF CALIFORNIA, ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

No. 76-1705

CALIFORNIA MILK PRODUCERS ADVISORY BOARD,
ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
AND ITS MEMBERS IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Cal. Pet. App. 1-7)¹ is reported at 549 F. 2d 1321. The opinion of the district court (Cal. Pet. App. 18-24) is not reported.

¹"Cal. Pet." refers to the petition filed in No. 76-1678 by the State of California on behalf of C.B. Christensen, Director of Food and Agriculture. The petition filed by the California Milk Producers Advisory Board and Cunningham & Walsh, Inc. in No. 76-1705 is referred to as "Bd. Pet."

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1977. The petition for a writ of certiorari in No. 76-1678 was filed on May 27, 1977, and in No. 76-1705 on June 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).²

QUESTION PRESENTED

Whether the principle that defenses to administrative complaints be initially resolved by the agency was properly applied to a claim by a state milk producers' advisory board and its advertising agency that the Federal Trade Commission lacked jurisdiction to remedy their allegedly deceptive advertising.

STATUTES INVOLVED

Sections 5 and 12 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (and Supp. V) 45 and 52, are set forth at Cal. Pet. App. 8-17.

STATEMENT

This case arises out of an administrative complaint issued by the Federal Trade Commission alleging reason to believe that the California Milk Producers Advisory Board and its advertising agency, Cunningham and Walsh, Inc. ("C & W"), had disseminated false and deceptive advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. (and Supp. V) 45 and 52).³ The

²In No. 76-1678, the State erroneously invokes the Court's jurisdiction under 28 U.S.C. 1257(3), which applies only to review of judgments rendered by state courts.

³Specifically, the Commission alleged that the advertisements represented that the consumption of milk is needed by all individuals, is beneficial in large quantities for all individuals and will lessen the probabilities of contracting colds or arthritis, although in fact the consumption of milk is not needed by and is detrimental to individuals with certain problems, such as symptomatic lactose intolerance, and will not prevent or lessen the probabilities of contracting colds or arthritis. The Commission's Complaint is attached as Exhibit A to this brief.

Federal Trade Commission's jurisdiction over "Corporations" is defined in Section 4 of the Act to include "any * * * association incorporated or unincorporated, * * * which is organized to carry on business for its own profit or that of its members" (15 U.S.C. 44).

The California Milk Producers Advisory Board ("Board") is an unincorporated association established pursuant to the California Marketing Act (Cal. Agri. Code §58601 *et seq.* (West's 1967)).⁴ The record indicates that the Board was established and operates for the purpose of implementing a commercial advertising campaign designed to reverse a long-term downward trend in the per capita consumption and sale of milk (R. 347-448; 334-340).⁵ Cunningham & Walsh is a corporation the Board retained to develop

⁴The Marketing Act empowers the State Director to establish marketing orders "which regulate producer marketing * * * by any and all persons * * * within this state." Cal. Agri. Code §58741. The marketing order for a given commodity is issued by the Director following the petition and approval of producers whom it would affect. The marketing order cannot become effective or be amended in any "major" way without the approval of 65 percent of affected producers or by approval of the producers of 65 percent of the commodity market. Cal. Agri. Code §§58991-58993. If the order is approved, the Director must issue it. Cal. Agri. Code §58741.

Each marketing order is required to provide for an advisory board (Cal. Agri. Code §58841), and, "[i]f the marketing order affects directly only producers of a particular commodity, the members of the advisory board shall be producers." Cal. Agri. Code §58842. While the Director of Food and Agriculture appoints all members, the producers nominate them. Cal. Agri. Code §58841 (R. 573, 575-577). The employees of the boards are not state employees. Cal. Const., Art. 24, §4; Cal. Agri. Code §58845 (R. 183).

⁵"R." refers to the record in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

an advertising campaign that included regional and local media in the states of California, Oregon and Washington (R. 278).⁶

The Commission charged that the allegedly deceptive advertising programs promoting the sale of milk were developed and implemented by the Board and Cunningham & Walsh for the pecuniary benefit of California producers and handlers of milk and that the members of the Board are milk producers who operate for the profit of themselves or the milk producers whom they represent.⁷ No state or state official is named in the Commission complaint, which seeks an order prohibiting the private in-

⁶In at least some of its advertising, the Board did not identify itself as a state agency, at times held itself out as part of the "California, Oregon, Washington Dairymen," and reportedly registered its trade name for the tri-state program as "California Milk Advisory Board, d/b/a California, Oregon, Washington Dairymen" (R. 303-304, 307).

Almost all of the Board's budget has been spent to further the interests of the dairy industry through the promotion of milk, with a substantial percentage of its budget (75 percent in 1973) allocated directly to the commercial advertising campaign involved in this case (R. 345). The boards are financed by funds collected by the State by means of a special assessment levied only upon industry producers. The assessment cannot be established or increased without the approval of 65 percent of producers or by producers dealing with at least 65 percent of the volume of productivity. Cal. Agri. Code §§58991-58993, 59034. Assessment funds not expended by the boards are to be reimbursed on a pro rata basis by the Director to the producers or carried over into the budget of the boards for the next year. Cal. Agri. Code §58938 (1977 Cum. Supp.). Board funds are not part of the State's general treasury. Cal. Agri. Code §58940 (1977 Cum. Supp.). The funding of the boards comes entirely from the industry; no public funds are utilized. Board funds are held in a separate interest-earning trust fund and are not commingled with general state revenues. Cal. Agri. Code §58939 (R. 175). The State is reimbursed from board funds for the time and expense incurred by state employees who perform work for the boards in connection with the function of the Director. Cal. Agri. Code §58941 (1977 Cum. Supp.).

dividuals who comprise the Board from promulgating or recommending deceptive advertising.

Without either answering the complaint or moving to dismiss the administrative proceeding, the Board and C&W filed the present suit in the United States District Court for the Northern District of California (joined by the State of California on behalf of its Director of Food and Agriculture) to enjoin the Commission's administrative proceeding and to obtain a declaratory judgment that the Commission lacks jurisdiction to proceed against them. The district court granted a permanent injunction, holding that under *Parker v. Brown*, 317 U.S. 341, the Commission has no jurisdiction because the challenged conduct was all state action (Cal. Pet. App. 20-24).

The court of appeals reversed (Cal. Pet. App. 1). Without reaching the merits of the jurisdictional question, the court ruled that the principle requiring exhaustion of administrative remedies made it inappropriate for the district courts to intervene before the Commission itself had the opportunity to construe its own statute in the context of "a solid factual record" (*id.* at 4-7).

ARGUMENT

1. Petitioner State of California argues (Cal. Pet. 2) that this case presents the question whether the California Director of Food and Agriculture and Milk Producers Advisory Board are "subject to the Federal Trade Commission Act * * * to the extent that they must exhaust their administrative remedies before the Federal Trade Commission * * *." Petitioner first misconceives the Commission's jurisdictional claim. The Commission's complaint did not name the State of California or its Director of Food and Agriculture and the Commission has never asserted jurisdiction in this proceeding over

any employee of the State of California.⁸ In addition, requiring a respondent in a Federal Trade Commission proceeding to exhaust its administrative remedies does not in any way "subject" it to the Federal Trade Commission Act; the exhaustion requirement is not derived from the Act but is a "long settled rule of judicial administration." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50; *McKart v. United States*, 395 U.S. 185, 193.

Petitioner cites no authority for the novel proposition that a claim of immunity from substantive liability frees a party from the obligation to raise the jurisdictional argument initially before the administrative agency charged with enforcement. Neither *Parker v. Brown, supra*, nor its progeny establish any exception to the judicial doctrine that "provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U.S. at 50-51; see also *Macaulay v. Waterman S.S. Corp.*, 327 U.S. 540; *Boire v. Greyhound Corp.*, 376 U.S. 473, 481-482; *McGee v. United States*, 402 U.S. 479; *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 647; *Weinberger v. Salfi*, 422 U.S. 749, 765. Petitioner has identified no conflict with the decisions of this Court or of the other courts of appeals. Indeed, the exhaustion doctrine has uniformly been applied to claims that the "state action" principle of *Parker v. Brown* limits the Commission's authority to proceed. *Federal Trade Commission v. Markin*, 532 F. 2d 541, 544 (C.A. 6); *Federal Trade Commission v. Feldman*, 532 F. 2d 1092, 1098 (C.A. 7). See also *United States v. Feaster*, 410 F. 2d 1354 (C.A. 5), certiorari denied, 396 U.S. 962.

Thus, contrary to the contention of the *amici curiae*, this Commission proceeding naming only private parties does not raise the jurisdictional issues that may be presented by the Commission proceeding concerning state milk price setting laws, announced on April 27, 1977.

2. The court of appeals correctly held that the policies supporting the exhaustion doctrine are fully applicable to a challenge to the Commission's jurisdiction based upon *Parker v. Brown, supra*. As the court of appeals said, there "is not certainly, [a] * * * clear jurisdictional defect" (Cal. Pet. App. 5).⁹ The Commission is entitled to determine in the first instance whether there is a state action exemption under its legislation similar to that recognized in *Parker* for the Sherman Act;¹⁰ the courts must give deference to the Commission's interpretation of its own act. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385; *Federal Trade Commission v. Mary Carter Paint Co.*, 382 U.S. 46, 49; *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233.

⁸Petitioners' claim is not covered by any of the recognized "narrow" exceptions to the exhaustion requirement (*Boire v. Greyhound Corp., supra*, 376 U.S. at 481). Compare *Leedom v. Kyne*, 358 U.S. 184, 187 (agency action clearly contrary to specific statutory prohibition); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (agency action has foreign policy implications). Petitioners rely upon *Federal Trade Commission v. Miller*, 549 F. 2d 452 (C.A. 7), where the court held that the Federal Trade Commission Act expressly gave common carriers an immunity from investigation or regulation by the Commission (see Section 6(a), 15 U.S.C. (Supp. V) 46(a)) so as to bring the case within the exception recognized in *Leedom v. Kyne*. This narrow exception is inapplicable to petitioners' claim of implied antitrust immunity. Indeed, the court in *Miller* relied upon the prior decision of that court in *Federal Trade Commission v. Feldman, supra*, holding that the exhaustion doctrine applied to a claim of implied immunity.

⁹The Board and C & W include in their questions presented the issue whether states or their agencies, officers and instrumentalities are subject to the jurisdiction of the Commission, but that question was not decided by the court of appeals and is not properly before the Court. In any event, there is no conflict in the case law concerning that issue, which petitioners describe as "one of first impression" (Bd. Pet. 6, n. 3; Cal. Pet. 6, n. 3).

Parker decided only that "nothing in the language of the Sherman Act or in its history * * * suggests that its purpose was to restrain a state or its officers" from exercising the sovereign power of the state (317 U.S. at 350-351). The Commission has not yet determined whether the language and legislative history of the Federal Trade Commission Act preclude Commission false-advertising jurisdiction over states or state agencies, or individuals claiming to act under the mantle of state regulation. One of the principal purposes of the exhaustion doctrine is "[t]he need to protect the primary authority of an agency to determine its own jurisdiction. * * * While the [agency's] decision is not the last word, it must assuredly be the first." *Federal Power Commission v. Louisiana Power & Light Co.*, *supra*, 406 U.S. at 647.

Exhaustion is also required here to enable the Commission to develop a factual record against which the "state action" defense may be assessed.¹¹ This Court has not treated the *Parker* issue as involving only "statutory construction" (Bd. Pet. 12), but has instead closely examined the roles of private and public parties in determining whether the challenged activity is "state action"

¹¹A full factual record here would provide the necessary context for assessment of such questions as whether it is policy of the state as sovereign to "compel" or even authorize the use of allegedly deceptive advertising and whether such advertising is "essential" to the state's regulatory program; whether the advertising was in essence the action of the private beneficiaries of the program in which the state only "acquiesced"; whether the program clearly reflected state policy which had been subject to "pointed reexamination by the policy maker" in light of those features alleged to violate federal law; whether a state's authority to foster deceptive advertising is as great as its authority to limit competition; and whether the advertisements at issue here were consistent with state policy prohibiting "false" claims in advertising developed under the marketing program. See generally *Bates v. Arizona State Bar*, No. 76-316, decided June 27, 1977.

immune from liability under the Sherman Act. *E.g., Bates v. Arizona State Bar*, No. 76-316, decided June 27, 1977, slip op. 7-11; *Cantor v. Detroit Edison Co.*, 428 U.S. 579; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-792.¹² While petitioners claim that the Board is a state agency, the Commission has reason to believe that the Board was established and functions for the private profit of its members and those they represent.¹³ The entry of the permanent injunction by the district court terminating the Commission administrative proceeding precluded a complete factual development that would have illuminated the actual status and functioning of the

¹²Petitioners attribute significance to the Commission's failure to include as a party to the administrative proceeding the State or the Director, whom they regard as the real parties in interest and hence indispensable parties. But there is no claim here that the State or the Director required the allegedly false advertising and the proposed order attached to the Commission complaint does not require them to take any affirmative action. See *Williams v. Fanning*, 332 U.S. 490. Assuming they are the real parties in interest, a proper determination of the state action issue by the Commission and the courts upon review does not necessarily require that they be named as respondents in the Commission's administrative proceeding. See *Bates, supra*, slip op. 9; *Cantor v. Detroit Edison Co., supra*, 428 U.S. at 584-585. At any rate, the exhaustion doctrine has been held applicable to claims concerning indispensable parties. *E.g., Coca-Cola Co. v. Federal Trade Commission*, 475 F. 2d 299 (C.A. 5), certiorari denied, 414 U.S. 877.

¹³Petitioners incorrectly state that their agency status is undisputed. The Federal Trade Commission's brief in the court of appeals stated (p. 29) explicitly that "the district court's finding that the Board is an instrumentality of the state is not undisputed on this record * * *."

Board.¹⁴ Of course, even a proven claim of agency status would not by itself conclude the *Parker v. Brown* issue, since as this Court said in *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 791, "[t]he fact that the State Bar is a state agency for some purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

Finally, application of the exhaustion doctrine here also serves the interests of judicial efficiency, for if the Commission agrees with petitioners' "state action" claim or otherwise determines that there is no violation or that no relief should be ordered, "the courts may never have to intervene." *McKart v. United States, supra*, 395 U.S. at 195.¹⁵

¹⁴Petitioners and *amici* err in suggesting that exhaustion is unnecessary because the Commission has already determined the "state action" question adversely to petitioners (Cal. Pet. 15; Bd. Pet. 14; *Amici* Br. 4). In issuing its complaint the Commission only indicated that it had "reason to believe" there may have been a violation; the Commission has not definitively considered and determined the question whether a "state action" defense is available to the Board and C & W. Petitioners rely upon the briefs of agency counsel claiming that prevailing law would support the Commission's jurisdiction over false advertising by the states. Nowhere was it represented that the Commission had made its jurisdictional determination (p. 56), but only that the administrative proceeding should continue so "that the Commission will have the opportunity to apply and interpret its own statute regarding * * * jurisdiction." At any rate, there is a well-established distinction between determinations by an agency and assertions by agency counsel. E.g., *Federal Trade Commission v. Sperry & Hutchinson Co., supra*, 405 U.S. at 246.

¹⁵There is no occasion to hold this case pending disposition of *City of Lafayette v. Louisiana Power & Light Co.*, No. 76-864, petition for a writ of certiorari granted March 28, 1977, since that case involves only the Sherman Act. The Commission's proceeding, which involves issues of public health and is brought under the Federal Trade Commission Act, has been stalled at the threshold since 1974 by virtue of injunctions and stays that are still in effect.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MICHAEL N. SOHN,
General Counsel.

GERALD P. NORTON,
Deputy General Counsel.

JEROME D. CUMMINS,
Acting Assistant General Counsel.

MARK W. HAASE,
*Attorney,
Federal Trade Commission.*

SEPTEMBER 1977.

EXHIBIT A
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

**CALIFORNIA MILK PRODUCERS ADVISORY
BOARD, an unincorporated association, and
CUNNINGHAM & WALSH, INC., a corporation.**

DOCKET NO. 8988

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the California Milk Producers Advisory Board, an unincorporated association, and Cunningham & Walsh, Inc., a corporation, hereinafter referred to as "respondents", have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: For purposes of this complaint, the following definitions shall apply:

1. "Advisory Board" means respondent California Milk Producers Advisory Board.
2. "Marketing Act" means The California Marketing Act of 1937, as amended, Agricultural Code of the State of California, Para. 58.601 *et seq.*
3. "Marketing Order" means the Marketing Order for Research, Education, and Promotion of Market Milk and Dairy Products in California, promulgated by Jerry W. Fielder, Director of Agriculture, October 9, 1969, as amended.

PARAGRAPH TWO: Respondent Advisory Board is an unincorporated association organized, existing and doing business under and by virtue of the Marketing Order, under the authority of the Marketing Act, with its principal office and place of business located at 1213-13th Street, Modesto, California 95354.

PARAGRAPH THREE: Respondent Cunningham & Walsh, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 260 Madison Avenue, New York, New York 10016.

PARAGRAPH FOUR: Respondent Advisory Board is now and has been engaged in the development, implementation, and administration of advertising programs relating to milk. Said programs are operated for the pecuniary benefit of producers and producer-handlers of milk located in the State of California, and inure to the pecuniary benefit of producers and producer-handlers of milk located in the State of California, and in other states. The members of the Advisory Board are producers and producer-handlers of milk located in the State of California. Said producers and producer-handlers are persons, partnerships or corporations operating for profit or for the profit of their members.

Said advertising programs include, and have included, but are not and have not been limited to the dissemination, publication, and distribution of advertisements, including but not limited to the advertising referred to herein, to promote the sale of milk, which comes within the classification of "food", as said term is defined in the Federal Trade Commission Act.

PARAGRAPH FIVE: Respondent Cunningham & Walsh, Inc. is now, and for some time last past has been, an advertising agency for the Advisory Board and is now preparing and placing, and has prepared and placed for publication, and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of milk, which comes within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PARAGRAPH SIX: In the course and conduct of their said activities and/or businesses, respondents have disseminated, recommended and/or caused the dissemination of certain advertisements concerning milk by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in magazines and other periodicals of general circulation, and by means of television and radio broadcasts transmitted by television and radio stations located in the State of California, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products; and have disseminated, recommended and/or caused the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH SEVEN: Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are a number of television and radio commercials featuring endorsements

of famous celebrities, and print media advertisements. These commercials and promotional materials contain messages concerning the uses, purposes, utility, characteristics and effects of milk. As representative of the aforementioned commercials, several such television, radio and print media advertisements are set forth in printed form in subparagraph A-E below:

A. One such television commercial, using a close-up of Mark Spitz, a well-known Olympic swimmer, states the following:

VIDEO:

1. OPEN ON CU OF MARK SPITZ.

MARK: No, I don't get embarrassed ordering milk. As a matter of fact I order it all the time. I think ordering milk whether you're 10 years old or 100 . . . I think uh, it's something that your body really needs. An uh I --- I wouldn't get embarrassed at all.

2. DISS TO TITLE: MILK HAS SOMETHING FOR EVERY BODY

ANNCR: Milk has something for every body.

3. DISS TO TITLE: Even Mark Spitz's

Even Mark Spitz's

4. DISS TO CU OF MARK SPITZ. ADD SUPER: CALIFORNIA-OREGON-WASHINGTON DAIRYMEN.

ANNCR: You know, I say "two glasses please". (LAUGH) I wouldn't try to hide it and say, "I'll have a small" (LAUGHS)

B. Another such radio commercial, using Vida Blue, a well-known baseball player, states the following:

AUDIO:

VIDA: I do coach a Little League team, and it's in this same pasture that I used to play ball in. We'd come out after school and we play a little ball, and we have fun. And naturally I'll take 'em to my house afterwards, and I'll treat 'em to, uh, cookies and milk. So I try to influence kids about growing up and just, uh, knowing the difference between right and wrong. And, uh . . . I've never told my Little League Team that I drink two and a half gallons of milk, but I've just told them that I drink a lot of milk, and that it's good for you, and it's good for your body. And I'm just waiting for the day that I can see one of my little kids become a great professional athlete.

AUDIO:

VO: Every body needs milk. Even Vida Blue's.

VIDA: . . . Try to stress to the kids, living a clean life and keeping your body in top

physical condition and just growing up . . . an American. A *true* American.

C. Another such television commercial, using a close-up of Ray Bolger, a well-known dancer, states the following:

VIDEO:

1. OPEN ON CU OF RAY BOLGER.

Ray: The big important thing in our business—the movement of the body—is to keep your calcium balance. The extremities, for instance; the hands. We use our hands in dancing, see? We must have a facility of having freedom of the hands. The hands are a beautiful thing when used properly. I mean when they're, ah . . . but they shouldn't look like your playing Dracula, you know. And so therefore you want them sort of free and easy and you can't have arthritic little joints. As a matter of fact, a person who does strenuous exercise . . . milk is, is . . . it's terribly important that you have your proper intake of milk. I suppose it would be obvious for me to say that I drink milk. But it's more than obvious; it's an absolute necessity for me.

AUDIO:

2. DISS TO TITLE.

3. DISS TO TITLE.

4. DISS TO CU OF BOLGER.

D. Another such radio commercial, using Dear Abby, a famous newspaper columnist states:

AUDIO:

ABBY: I'm only in daily newspapers, and I'm published around the world . . . Ireland, Buenos Aires. Fifty-Five million daily . . . That's a lot of people, really. People tell me things they wouldn't tell anybody else. Kids tell me things they wouldn't tell their parents; husbands tell me things they wouldn't tell their wives; vice versa. And it, I imagine it's a great outlet . . . people being able to . . . well, make a wailing wall out of me. When you know that fifty-five million eyes are on you every day, you are very careful of what you . . . what you say. And, uh, I have to keep my energy up. I have a lot of vitality; I always have. Thank heavens, I have very good health; I'm very seldom sick; I very seldom have a

cold . . . and I think I probably can attribute that to the fact that I have been a milk drinker all my life. And I still am.

VO: Every body needs milk.
Even Dear Abby's.

ABBY: I'm a really good ad for dairy products, because . . . I love cheese, whipped cream, milk . . . Milk goes with everything'

E. One such print media advertisement is the following:

"Whether you're 10 years old or 100, I think it's something your body needs. In fact, I say: 'Two glasses, please!'"

[Picture omitted]

Milk has something for everybody. Even Mark Spitz.

PARAGRAPH EIGHT: Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication that:

- A. The consumption of milk is essential, necessary and needed by all individuals irrespective of the state of their health.
- B. The consumption of milk is beneficial for all individuals.
- C. The consumption of milk is beneficial in large or unlimited quantities.
- D. The consumption of milk will prevent or will lessen the probabilities of contracting colds or arthritis.

PARAGRAPH NINE: In truth and in fact:

- A. The consumption of milk is not essential, necessary or needed by individuals with health problems such as certain allergies and symptomatic lactose intolerance.
- B. The consumption of milk is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance.
- C. The consumption of milk in large or unlimited quantities is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance.
- D. The consumption of milk will not prevent and not lessen the probabilities of contracting colds or arthritis.

Therefore, the statements and representations in said advertisements referred to in Paragraph Seven, and others similar thereto not specifically referred to herein, were and are misleading in material respects and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, and the statements, representations, and failure to disclose material facts set forth in Paragraphs Seven and Eight were, and are, unfair, false, misleading and deceptive.

PARAGRAPH TEN: The use by respondents of the unfair, false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of milk.

PARAGRAPH ELEVEN: The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to

the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 1 day of August A.D., 1974, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 23rd day of September A.D. 1974 at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, 1101 Building, 11th & Pennsylvania Avenue, Northwest, Washington, D.C. 20580 as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be

true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceeding in this matter that the proposed order provisions as to the California Milk Producers Advisory Board, an unincorporated association, and Cunningham & Walsh, Inc., a corporation, might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

IT IS ORDERED that respondents California Milk Producers Advisory Board, an unincorporated association, and Cunningham & Walsh, Inc., a corporation, their successors and assigns, and their officers, and respondents'

agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of milk do forthwith cease and desist from:

1. Disseminating, or causing or recommending the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that:
 - (a) The consumption of milk is essential, necessary or needed by all individuals, or that all individuals should consume milk.
 - (b) The consumption of milk is beneficial for all individuals.
 - (c) The consumption of milk is beneficial in large or unlimited quantities.
2. Disseminating, or causing or recommending the dissemination of any advertisement by means of the United States mails or by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents that the consumption of milk contributes in any way towards preventing or lessening the probabilities of contracting any illness or disorder.
3. Disseminating, or causing or recommending the dissemination of, any advertisement by means of the United States mails or by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of milk in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the misrepresentations, representations, acts, or practices prohibited in Subparagraphs 1 and 2 above.

IT IS FURTHER ORDERED that respondent California Milk Producers Advisory Board mail copies of this order to the current or future members of said respondent and that respondent Cunningham & Walsh mail copies of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondents notify the Commission at least 30 days prior to any proposed change in respondent California Milk Producers Advisory Board, or respondent Cunningham & Walsh, such as dissolution, assignment or sale resulting in the emergence of a successor organization or corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 1 day of August A.D., 1974.

By the Commission, Commissioner Thompson dissenting.

/s/ **VIRGINIA M. HARDING**
ACTING SECRETARY

SEAL